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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 600.

In the Matter
of
THE PEORIA AND EASTERN RAILWAY COMPANY.

CHARLES S. ARONSTAM,
Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,
Respondents.

No. 601.

EPPLER & COMPANY,
Petitioner,

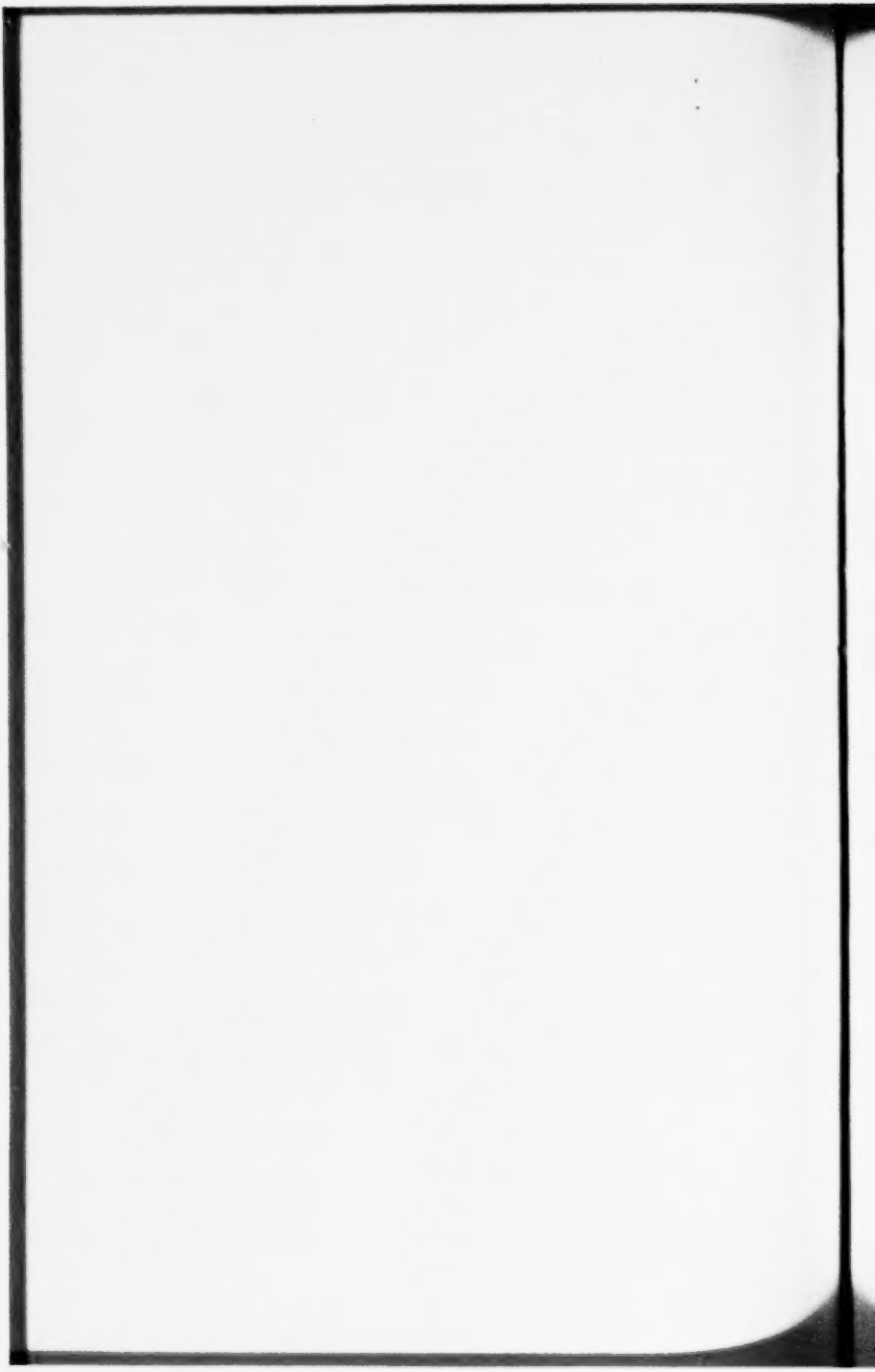
—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

F. W. H. ADAMS,
Counsel for Respondent, The Peoria and Eastern Railway Company.

PETER KEBER,
Of Counsel.



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BRIEF OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

Statement.

Charles S. Aronstam, Esq., as counsel for the Income Bondholders, and Eppler and Company (herein called Eppler), accountants, retained by Mr. Aron-

stam as such counsel, pray that writs of certiorari issue to the United States District Court for the Southern District of New York, sitting as a three-judge Special Court, to review the order of that Court, entered December 28, 1948 (R. 73-75). That order denied their separate claims for services and disbursements said to have been rendered in the Railroad Adjustment Proceeding affecting the Peoria and Eastern Railway Company.*

The Railroad Adjustment Proceeding in which the petitioners claim compensation was originally commenced in 1940 by the Peoria pursuant to Chapter XV of the Bankruptcy Act (53 Stat. 1134)** for approval of a Plan of Adjustment which had been approved by the Interstate Commerce Commission (239 I. C. C. 303). The adjustment was sought because in 1940 the First Mortgage Bonds of the Peoria were about to become due, and an agreement made in 1890, under which the Peoria was operated by the Big Four and later, by the New York Central, was about to expire.

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* We have used the following abbreviations:

P. & E., or the Peoria—the respondent, The Peoria and Eastern Railway Company.

Big Four—the respondent, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

New York Central—the respondent, the New York Central Railroad Company, controlling stockholder of the Big Four and after 1930 lessee of its property, including its interest in the P. & E.

Operating Companies—New York Central and Big Four.

Income Bondholders—a Protective Committee of the P. & E.'s Second Mortgage non-cumulative 4% Income Bonds, due 1990.

** The statute expired on July 31, 1940, except for pending proceedings, of which the Adjustment Proceeding, in which these claims were made, is one.

The District Court, by a decree entered on July 8, 1940, approved the Plan of Adjustment (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. denied 311 U. S. 700; *In re Peoria and Eastern Railway Co.,* 37 F. Supp. 917, cert. denied 314 U. S. 635). However, at the insistence of the Income Bondholders, represented then as now by the petitioner, Aronstam (R. 70), the question of the amount and validity of the accounts between the operating companies and the Peoria was left open for future determination. It was specifically provided, again at the insistence of the petitioner, Aronstam, that should the operating companies attempt, in any year, to withdraw any assets or earnings of the P. & E., upon objection by the representative of the Income Bondholders, the operating companies were required to establish their right to do so (R. 9, 21).

On April 1, 1943, after objection by the representative of the Income Bondholders to the annual accounts, the New York Central petitioned for an order appointing a Master under the decree to hear and report upon the validity and amount of the claim of the operating companies against the Peoria for advances in the sum of $2,356,687.33 as of December 31, 1942 (R. 2-11).

This petition was on notice to the petitioner, Aronstam, as attorney for the Income Bondholders Committee. On their behalf he answered, consenting to the appointment of the Master (R. 11-13).

The petitioner, Aronstam, then submitted an order providing for the appointment of the Special Master and also providing for his own appointment as attorney for the Income Bondholders, with his compensa-

tion to be paid by the Peoria (R. 4, 14, 19). The Court signed the order on May 23, 1943 but struck therefrom the provision requiring the Peoria to pay the compensation of petitioner Aronstam. The order, with the provision so stricken out shown in brackets, reads as follows:

> "Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further
>
> Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation, [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as] L. H., J. M. W., G. M. H. shall be approved and determined by the Court."

In view of the relationship between the New York Central and the Peoria, arising out of the stock control of the Peoria by the New York Central, and arising out of the operating agreement, the New York Central and the Big Four recognized the desirability of the Peoria's securing independent counsel to represent it in connection with the settlement of the inter-company accounts (R. 16, 17, 62).

On July 2, 1943, upon the petition of the New York Central, the Court appointed the undersigned, who

had no prior relationship with any of the parties, as an independent attorney to represent the Peoria (R. 22, 62). The appointment was on the specific understanding that the undersigned should protect the interests of the Peoria to the best of his ability as an attorney without regard to any stock or other control by the New York Central (R. 68, 69).

Thereafter, petitioner Aronstam retained Eppler, as accountants and traffic experts to assist him, as counsel for the Income Bondholders. This appointment was approved by the Special Master before the appointment of the undersigned as independent counsel to the Peoria. At the first hearing before the Special Master thereafter it was made clear that the undersigned, as independent counsel for the Peoria, did not consent to the payment of any of its funds to Eppler for services (R. 75-79).

Eppler then investigated the inter-company accounts and made a report. On the basis of this report petitioner Aronstam asserted claims against the operating companies before the Master in excess of $12,000,000, exclusive of interest (R. 37).

It is suggested that the positions taken by the Income Bondholders at the hearings before the Master were opposed by the undersigned. (Aronstam petition, p. 6; Eppler petition, p. 13.)

This is not the case (R. 58). After his appointment as independent counsel, the undersigned considered the proposed accounts, independently investigated the records of both the Peoria and the Operating Companies and generally investigated all possible issues (R. 62-65). With respect to each issue, consideration was given not only to the overall interests of the Peoria in relation to past transactions, but also in relation to its future welfare, without regard to the

special interests of any particular group of security holders (R. 58). The mere fact that the Income Bondholders saw fit to assert a particular claim did not, in our view, create an identity of interest between the P. & E. and the Income Bondholders, or provide a sufficient basis for adopting it. For the same reasons, where a claim of the Income Bondholders appeared to be detrimental to the best interests of the P. & E., it was, without hesitation, opposed. It is perhaps significant in this regard that the only claims allowed in this case, out of the $12,000,000 asserted by the petitioners, were those originated or supported by the undersigned (R. 58).

After hearings before the Special Master, and the coming in of his report, the Court, with minor adjustments, unanimously approved his report. (*Ewen, et al.* v. *Peoria and Eastern Railway Co.*, 78 F. Supp. 312.) The final result was that out of the enormous claims, both in number and amount, asserted by the petitioners, claims of $176,206.36, including interest, were allowed by the Court. The allowed claims, as above stated, were all either originated or supported by the undersigned (R. 57).

The allowance of these claims, however, actually was not a gain for the Peoria but, in fact, constituted a loss. Actually the whole adjustment, including all interest allowances and conceded adjustments, amounted to $246,240.68 (R. 57). However, the Peoria was, by the action of the Income Bondholders in objecting to the accounts, compelled to pay interest, at 6%, on the total advances of the operating companies instead of receiving credit on its earnings (R. 57, 58). This interest was $342,637.47 (R. 58).

The result, therefore, of the proceedings brought about by the petitioner, Aronstam, was that the Peoria

lost the difference between $342,637.47 interest incurred and the sum of $246,240.68, the benefits alleged to have been obtained by the Income Bondholders, or $96,396.70, before the granting of any allowances (R. 58).

After the entry on November 16, 1948 of the decree establishing this loss, the Income Bondholders petitioned for a writ of certiorari for its review. This petition was denied by this Court on February 28, 1949. (*Income Bondholders of the Peoria and Eastern Railway Co.* v. *The New York Central Railroad Company, et al.*, 336 U. S. 919.) Therefore, the whole of this proceeding has finally concluded with a loss to the Peoria, before considering expenses, of at least $96,396.70.

The petitioner Aronstam, after the entry of the final decree on November 16, 1948, applied to the Special Court for fees and disbursements aggregating $133,390.38 (R. 33-53) and made an application on behalf of Eppler for services and disbursements in the sum of $119,451.86 (R. 23-32).

The application of Aronstam was unanimously rejected by the Special Court (R. 70-71). Eppler's application was allowed in respect of the part of its services devoted to preparing a report, and denied in respect of its claim for assisting counsel for the Income Bondholders to prepare for the hearings and testify at his call (R. 71-73).

Both Aronstam and Eppler now pray for writs of certiorari to review the order of the Special Court, entered December 28, 1948.

ARGUMENT.

I.

This Court has no jurisdiction.

(a)

Both petitioners claim that this Court has jurisdiction under Section 745 of Chapter XV of the Bankruptcy Act (1939, 53 Stat. 1134) which, as we have seen, expired by its terms on July 31, 1940 (Section 755) (Aronstam petition, p. 7; Eppler petition, p. 7). That section provides as follows:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved * * *"

The petitioners do not come within the definition of those "affected" by the plan. Thus Section 706 provides:

> "No creditor shall be deemed to be 'affected' by the plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor."

No assertion is made, nor could one be made, that the order sought to be reviewed "proposes a modification of the evidence of debt or other instrument defining the rights" of the petitioners, or of their security.

It therefore follows, in our respectful submission, that since the petitioners are not "affected" by the plan there is no basis for the granting of writs of certiorari to review the order denying their claims.

(b)

In any case, Eppler has no right to be heard in this Court. The order sought to be reviewed, as we have stated, allowed a part of the amount applied for. This amount has been paid to Eppler and accepted by it. Under these circumstances, the right of appeal is lost. "Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other." *Kaiser* v. *Standard Oil Co.*, 89 Fed. 2d 58; see also, *Terry* v. *Abraham, et al.*, 93 U. S. 38; *Altman* v. *Shopping Center Bldg. Co.*, 82 Fed. 2d 521, 527; *Storley, et al.* v. *Armour & Co.*, 107 Fed. 2d 499, 504; *Colquette* v. *Crossett Lumber Co.*, 149 Fed. 2d 116.

II.

The Special Court had no jurisdiction to grant petitioners allowances chargeable against the Peoria.

The Special Court in refusing the allowances requested found it unnecessary to determine whether it had jurisdiction to grant such allowances under the statute. However, in two earlier decisions in this same adjustment proceeding the Special Court found that it lacked such jurisdiction. (*In re Peoria and Eastern Railway Company*, 37 F. Supp. 917 (1941), cert. denied 314 U. S. 635 and 49 F. Supp. 83 (1943).)

These determinations were made after the Plan of Adjustment was approved and when petitioner Aronstam, then as now representing the Income Bondholders, claimed compensation for his services.

In those decisions the Special Court, following the holdings in *Baltimore and Ohio Railroad Company,* 34 F. Supp. 154, cert. denied 311 U. S. 717, and *Schweidel* v. *Lehigh Valley Railroad Company,* unreported order, October 21, 1940, cert. denied 312 U. S. 684, held that in Adjustment Proceedings under Chapter XV as distinguished from Reorganization Proceedings, the Court had no power to grant allowances except to the debtor railroad. Thus the Court said (37 F. Supp. 917, 921):

> "It seems to us clear that Chapter 15 of the National Bankruptcy Act covering Railroad *Adjustments,* in so far as allowances to others than the petitioner Railway are concerned, is not in *pari materia* with Title 11 United States Code, Section 205, 11 U. S. C. A. §205, which deals with the *Reorganization* of Railroads. * * *
>
> It seems to us that the omission of such a provision from Chapter 15 of the National Bankruptcy Act, which gave a three-judge court jurisdiction in *Proceeding for Railway Adjustment,* makes it quite clear that we have not any jurisdiction properly to grant any allowances herein to the intervenors or their counsel."

It is significant that the earlier applications were made on exactly the same basis as presently. Then as now petitioner Aronstam represented the Income Bondholders. Then as now the petitioner claimed

that his services were for the benefit of the Peoria as a whole, while in fact he was acting for the Income Bondholders.

III.

No basis existed for granting the allowances sought.

As we have seen, the order of May 21, 1943, designated Mr. Aronstam "as counsel to represent the Income Bondholders of the Peoria and Eastern Railway Company in these proceedings before the Special Master", and provided that "the said counsel, with the approval of the Special Master, may employ accountants and traffic experts to assist him in connection therewith" (R. 14). As the Special Court expressly held (R. 71) "his request then made for an order that the compensation for such representation be eventually charged against the estate of the petitioning debtor was unequivocally rejected by the court".

Not only was the matter of petitioners' right to compensation thus determined at the outset, but, as the Court expressly found, that the petitioner Aronstam "himself disclaims any retainer direct or indirect by or in behalf of the debtor (R. 71).

Further, petitioner Aronstam has had associated with him throughout the major part of this proceeding counsel for one Wood, the owner of $961,000 of Income Bonds, who in fact advanced a large proportion of the petitioner Aronstam's disbursements (R. 38, 46, 47). It is, we suggest, not likely that this association and participation was for any interest other than the Income Bondholders. Under these circumstances,

it is difficult to understand how the petitioners can now assert that any of their activities were compensable by the debtor.

Moreover, as the Court found, the debtor was otherwise adequately represented (R. 71) and therefore the Court could not properly charge against the estate "an expense incurred solely at the instance of the bondholders" (R. 71).

In this connection we respectfully point out that, despite the assertion of the petitioners to the contrary (Aronstam petition, p. 14), the undersigned did in fact carry on an exhaustive independent investigation of the accounts and transactions between the parties for the period from 1920 through 1942 (R. 63, 64, 65). Further, the nature of the independent representation of the Peoria may be seen from the fact that despite the claims running into the millions asserted by the petitioners the few claims actually allowed were those originated by independent counsel or supported by him (R. 58).

Nor is there any basis for the claim particularly pressed by Eppler (Petition for Writ of Certiorari, pp. 10-12) that had there been a receiver or trustee in this case, and had the petitioners rendered services for such receiver or trustee, they would have been entitled to compensation at the hands of the Court.

The fact is that under the statute no receiver or trustee could be appointed and none was necessary. (*Ewen, et al.* v. *Peoria & E. Ry. Co.,* 34 F. Supp. 332, 338.) The activities of the petitioners were all directed toward improving the position of the security holders they represented; any benefit to the Peoria was plainly incidental to this interest.

Finally, even if it were assumed that this were a case in which the Court had some equitable power to grant an allowance, such a grant would be governed by the well settled principle in analogous cases that such compensation, when and if awarded, is always related to the amount recovered. (*Winkelman* v. *General Motors Corp.*, 48 F. Supp. 504; *The Counsel Fee in Derivative Stockholders' Suits,* 39 Columbia Law Review 784 and cases therein cited.)

Here as we have seen (*ante,* pp. 6, 7), the action of the petitioners resulted in an actual loss to the debtor railroad in the sum of $96,396.70 (R. 55-57). Moreover, if we add up the claims of Mr. Aronstam and those of Eppler we find that they aggregate $252,842.24. As against this the benefits alleged to have been secured (assuming no loss on account of interest charges incurred) amounted to only $246,-240.68, or an excess of allowances claimed over benefits alleged of $6,601.56.

In this connection, it should also be noted that no benefit whatever was obtained through the services of Mr. Cook of Coverdale and Colpetts, for whom Mr. Aronstam seeks $10,092.53 or from the services of William Wyer & Co. claiming $3,069.65, or from the services of R. P. Patterson and his assistant for whom $4,980.83 is sought (R. 50-53; 59-60). Not only did no benefit result from the activities of these persons, but the petitioner Aronstam never even sought or obtained approval of their employment by the Special Master, despite the direction of the order of May 21, 1943, that such approval be obtained (R. 14).

It therefore seems clear that this is a case in which the petitioners, acting in the interests of their prin-

cipals, sought to impose a huge liability, which if sustained, would have necessarily resulted in substantial financial gain to their principals. In the final event, however, the result was that not only was this effort unsuccessful but the debtor railroad was caused to sustain substantial losses. Under the circumstances, there is no basis, equitable or otherwise, upon which these allowances could be granted.

CONCLUSION.

No reasons for review by this Court having been shown, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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PETER KEBER,
Of Counsel.